"The decree of the District Court declared null and void and enjoined further performing or executing the agreements between primary defendants described in the petition. It further declared null and void and enjoined further performance of 'the agreements entered into by the primary defendants with the various secondary defendants, pursuant to and in accordance with the said void agreements of the primary defendants, and described particularly in the petitioner's petition.' (R. 2020-2021.) The Government does not conceive that the purposes and objects of the Sherman Act require the courts to declare void these agreements between the primary and secondary defendants. The objects of the Act would seem to be fully accomplished if the agreements were simply declared voidable and the secondary defendants given the option, within a stated period from the date of the entry of a modified decree pursuant to the mandate of this Court, to affirm or disaffirm these agreements. If any such agreement is thus affirmed, the primary defendants should be enjoined from suing the licensee for damages, profits, or infringement for the use by the licensee, during the period of the license, of any patents covered by it as long as the licensee complies with the terms of its license. This, in substance, was the relief with respect to agreements between primary and secondary defendants which the Government requested in the decree which it submitted to the District Court."

Again, at page 73, it says:

"In the opinion of the Government the decree of the District Court does not apply to any license to a secondary defendant issued prior to the first cross-licensing agreement by its licensor. If this is correct, the decree does not apply to a license

to a secondary defendant issued by Indiana or Texas prior to August 26, 1921, issued by Gasoline Products prior to January 26, 1923, or issued by New Jersey prior to September 28, 1923. No other interpretation of the decree seems possible in the light of the District Court's opinion."

Again, at page 74, it says:

"The Government does not oppose modifying the decree of the District Court to make certain that it does not apply to any license issued to a secondary defendant by a primary defendant before the latter was a party to any cross licensing agreement."

By the specific admission quoted from page 73, fifty-three of the seventy-nine contracts are disposed of. No. 31 is the first cross-licensing agreement and therefore, the Government concedes Nos. 1 to 30, both inclusive, to be unaffected by the decree. On page 74 it specifically adds Nos. 39 and 57, and the same reasoning applies equally to Nos. 32 and 33.

In addition to these thirty-four agreements, Gasoline Products Company, before making its first cross-licensing agreement, Number 55, had issued thirteen licenses under its own patents only, viz. Nos. 34, 35, 38, 40, 41, 42, 43, 44, 47, 50, 51, 52 and 53.

In addition to these, New Jersey, before its first cross-licensing agreement, had issued five licenses under its own patent rights only, being Nos. 36, 49, 64, 65 and 69.

In addition to these, the tabulation itself, contained in the petition (R-16), shows that No. 37 was cancelled in June, 1922, which was two years before this action was commenced.

From the seventy-nine contracts listed in the petition, therefore, we eliminate the foregoing total of fifty-three which leaves twenty-six contracts for consideration. Of these, nine are between the primary defendants and seventeen are licenses issued by one of the primary defendants to one of the secondary defendants after the execution of the cross-licensing agreement to which the licensor was a party. As to these seventeen, the Government now says to the Court that it "does not conceive that the purposes and objects of the Sherman Act require the courts to declare void these agreements between the primary and secondary defendants," and that the secondary defendants should be given the option to affirm or disaffirm. The Government's position, therefore, eliminates these seventeen contracts, which leaves only the nine contracts between the primary defendants for consideration. They are numbers 31, 55, and 73 to 79.*

On page 60 of its brief, the Government says that it "does not contend, and the District Court did not hold, that it is illegal for competitors to grant each other reciprocal, non-exclusive patent licenses."

Of the nine primary agreements, Nos. 75 and 76 are merely reciprocal, non-exclusive patent licenses between New Jersey and Gasoline Products, and therefore, come within the Government's admission of validity. Nos. 73, 77, 78 and 79 relate entirely to patent rights in foreign countries, and therefore are eliminated.

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*The Government, at page 6 of its brief, states that 15 of the 79 agreements were between primary defendants. But, of these 15, six (Nos. 4, supplemented by No. 15 and superseded by No. 21; No. 5, expired in 1917, and No. 12, modified by No. 33) were merely licenses or assignments from Indiana to New Jersey, which, in these agreements, was in the position of a secondary defendant.

This analysis of the Government's admissions discloses that the only contracts which the Court need consider are Nos. 31, 55 and 74, as these are the only ones left.

SECOND: The Government's brief likewise discloses a complete departure from the case made by the Government's petition. The prayer of the petition (R-41) does not seek to strike down *in toto* any of the contracts, but merely seeks to eliminate from them the so-called restrictive conditions. The restrictive conditions are set out in the petition commencing at page 26 of the record. Each restriction is described and the particular contracts in which it is contained are specified by numbers. A comparison of the numbers so specified with the numbers of the contracts listed in the preceding paragraph admitted to be valid by the Government will disclose that, with the exception of the option clause, every restrictive covenant objected to by the Government is contained in agreements executed by one primary defendant prior to the time of its first cross-licensing agreement, except the licenses granted by Gasoline Products Company, Nos. 56, 58, 59, 60, 61, 63, 66, 67, 68, 70, 71 and 72.

The option clause was waived at the oral argument at the suggestion of the Court months before the decree was rendered and the Court accepted this waiver saying in its opinion (Vol. III p. 2014):

> "Were this the only provision objected to, we would view the litigation as happily ended."

The licenses granted by Gasoline Products Company listed above were issued after the date of its first cross-licensing agreement, which was No. 55, and as

to all of these the Government consents to modifying the decree so as to give the licensee the option to affirm or disaffirm.

We repeat, therefore, that the position now taken by the Government is entirely different from the case made by the Government's petition. The petition sought to strike down *only* the covenants which the Government in its brief now says are not subject to attack, or, if subject to attack, the licensee may have the option to affirm or disaffirm.

In the lower court, the Government interpreted the petition as we interpret it here. In its brief before the Court in support of its attack on the Master's report, it commenced by saying:

> "This is a suit by the United States under the provisions of the Sherman Antitrust Act (Act of July 2, 1890; 26 Stat. 209) to have *certain provisions* of contracts and agreements declared illegal in *the parts thereof* which place restrictions on the production, transportation and sale in interstate commerce of 'cracked' gasoline, kerosene, and petroleum products and to *enjoin the performance of such provisions* as an illegal combination * * *". (italics ours).

The Government now abandons the attack made by the petition. After giving weight to its concessions, its only attack now is on agreements Nos. 31, 55 and 74, which it attacks as a whole, notwithstanding that these agreements contain none of the restrictive covenants except the abandoned option clause in No. 31. With this clause eliminated, the prayer of the petition leaves these three agreements untouched.

THIRD: In the argument of its second proposition commencing at page 60 of its brief, the Government

narrows the attack upon agreements Nos. 31, 55 and 74.

On page 60 of the brief the Government says:

> "The Government does not contend, and the District Court did not hold, that it is illegal for competitors to grant each other reciprocal, non-exclusive patent licenses."

Each of the agreements, therefore, in so far as they are grants of reciprocal, non-exclusive patent licenses, the Government concedes to be valid.

On page 61 of the brief, it is said:

> "The Government does not contend, and the District Court did not hold, that competitors may not legally receive and give appropriate consideration for the grant to each other of reciprocal, non-exclusive patent licenses."

The three contracts, Nos. 31, 55 and 74, did provide for receiving and giving consideration by each to the other for the reciprocal, non-exclusive licenses. The only point of difference, therefore, between the primary defendants and the Government now is whether the consideration was "appropriate."

At page 64 of the Government's brief, it is said:

> "The vice in the combination between the primary defendants was not in the mere exchange of immunities from claims of infringement, nor in the acquisition of patents which had some relation to processes previously employed, in which large investments had been made and upon which business legitimately developed was dependent."

These concessions by the Government narrow the range of debate because the Government agrees

that the primary defendants were within their rights (a) in granting to each other reciprocal, non-exclusive patent licenses; (b) in giving and receiving considerations for the respective grants; and (c) in acquiring patent rights having some relation to processes previously employed in which large investments had been made and upon which business legitimately developed was dependent. We respectfully submit, therefore, that the only point at issue now between the Government and the primary defendants is whether the consideration was appropriate and whether the scope of the settlement was more inclusive than was justified.

The primary defendants had a right to settle their patent differences; they had a right to settle pending litigation; they had a right to grant cross-licenses; they had a right to pay and receive appropriate consideration for these cross-licenses; and if they had a right to settle existing controversies, they certainly had a right to settle controversies which they knew were sure to arise in the future. Both of these subjects have been fully discussed in the main brief of the primary defendants and in the separate brief of The Texas Company, and that discussion need not be here repeated.

FOURTH: The Government contends in its brief (page 50) that the direct purpose and effect of contract No. 31 was the restriction of interstate commerce in cracked gasoline within the so-called Indiana territory.

The complete answer to this argument is shown by the maps showing the marketing operations of The Texas Company during various periods. These maps are Exhibits 507 to 510 in Vol. II facing page 896, and they disclose a steady advance by The Texas Com-

pany into the so-called Indiana territory. This advance was even more rapid after Contract No. 31 was executed than before. The simple fact is that this contract was a settlement of patent controversies and was not intended to have, and did not have, the effect of affecting interstate commerce in any way except as it provided for freedom of licensing and freedom of operations, thereby enlarging the supply of cracked gasoline and creating keener competition.

The whole history of Indiana's so-called restrictive clauses shows a steady relinquishment of more and more of the monopoly given to it by its patents. It never attempted to enforce these provisions (Vol. II, pp. 1002, 1004); its subsequent cross licenses with New Jersey, Texas and Gasoline Products had no such restrictions; and all such restrictions have been eliminated from the early licenses.

FIFTH: The Government's brief comments on the large royalties Indiana was receiving prior to Contract No. 31, but says nothing about the royalties thereafter. The net royalties received by Indiana alone for the years 1918 to 1920 were as follows (Vol. II, p. 785):

1918	$3,141,808.05
1919	3,803,576.09
1920	3,338,923.29

The first primary agreement was made in 1921 and the net royalties received by all the primary defendants from all sources for the years 1921 to 1924 are as follows (Vol. II, p. 799):

1921	$1,971,266.29
1922	3,847,895.11
1923	2,741,925.27
1924	2,432,741.36

It is a striking fact that Indiana's average net royalties prior to Contract No. 31 were greater than the average net royalties of *all* the primary defendants after that contract, in spite of the steady increase in cracked gasoline production. For discussion of this alleged burden upon the industry, we call attention to Sections 133 and 180 of the Master's report, Vol. I, pp. 612 and 660.

The alleged royalty burden was upon only 6 per cent of the total gasoline production of all kinds in 1924, according to the figures relied on in the Government brief. Table VI, page 80 of that brief, gives the 1924 production of three groups of licensees for 1924, to which should be added the New Jersey, Louisiana and Humble production of Table I, p. 76; the aggregate of those represents the royalty paying gasoline. This is but 6 per cent of the U. S. gasoline *of all kinds* for that year (Bureau of Mines, Vol. II, p. 1014).

The argument of the Government is that the royalties charged the secondary defendants gave the primary defendants an advantage in competing for the gasoline market. We submit that by reason of their inventions they were entitled to some advantage. But we further submit that the secondary defendants, by reason of the licenses obtained, were placed in a stronger competitive position. Assuming that the royalty paid was approximately 25 per cent of the profits arising out of the cracking operation, the secondary defendants kept the other 75 per cent of these profits. Therefore, the primary defendants, by granting licenses, gave to the secondary defendants the advantage both of a greater supply of gasoline and of 75 per cent of the profit derived in the manufacture of that supply.

SIXTH. A series of charts extending from Vol. II, p. 885 to p. 895, shows that gasoline, as compared with the 1913 price level, is the cheapest commodity over a period of years ending with 1925. These charts were issued by the Department of Commerce. During the period from 1921 to 1924 the Government, in the Appendix to its brief, charges the defendants with the responsibility for producing from 86.41 per cent to 93.88 per cent* of the total cracked gasoline

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*We believe that the record does not support these figures (see our main Brief, note, p. 45; Government Brief, note p. 10), as an examination of Exhibit A (Government Brief, p. 76) will show.

Table VI (Govt. Brief, p. 80) states that in 1924 those defendants produced nearly 94 per cent of the total cracked gasoline. A 1925 table (II 868) shows that twenty-one "outside" competitive processes, used in active plants, had 45 per cent of the total cracking capacity, these defendants having 55 per cent; and the Master so found (I, 612). It is inconceivable that the proportions could have been much different in the preceding year, and inconceivable that 45 per cent of the capacity should have been used to produce only 6 per cent of the total cracked gasoline while the defendants' 55 per cent was being used to produce 94 per cent. The reasons for errors in the Government's calculations are as follows:

1. The amount of total cracked gasoline is uncertain. The Government's figures, taken from Texas estimates (II, 882) are less, by 157,000,000 gallons in 1921 and by 237,000,000 gallons in 1924, than the New Jersey estimates for those years (II, 938). Moreover, the Bureau of Mines figure for 1925 (II, 1009) is 1,381,000,000 gallons more than the Texas estimate for 1924, and 1,144,000,000 more than New Jersey's estimate for 1924. It is inconceivable that there should have been an increase of over a billion gallons in 1925 as compared with 1924. This means that all the figures before 1925 were mere, and inexact, estimates and too low. There are no official (Bureau of Mines) figures of cracked gasoline for any year prior to 1925.

2. No production figures of the secondary defendants are in the record except those of Louisiana and Humble. The Government arrives at the production of those paying royalties on a basis of 25 per cent of the profits, by dividing the royalties by four-tenths because Indiana testified (II, 1022) that .4c was about equal to 25 per cent of the net profit "under our experience," which obviously meant on an average over a period of years in the experience of Indiana. As to whether that was the experience of any particular licensee in any particular year is left entirely to conjecture, and the figures for the year 1921 show definitely that the experience did not apply to that year. That year was abnormal. Jersey produced 138,000,000 gals. that year and paid no royalty under its contract with Indiana (Ex. 86-II-787; Ex. 84-II-779) and, while Standard Oil Co. (Louisiana), produced 41,000,000 gals. in 1920 for which it paid a royalty of $150,000.00 it produced 48,000,000 gals. in 1921 and paid a royalty of only $48,000

produced in the United States. The Government's estimate (p. 80 of its brief) is that in 1921 these defendants produced 771,284,049 gallons of cracked gasoline, and that in 1924 produced 1,354,704,622 gallons of cracked gasoline. If we assume that the Government's estimates are approximately correct, we submit that instead of charging us with having produced this enormous quantity of cracked gasoline, it should have credited us with having done so. It is difficult to conceive how the addition of more than 1,300,000,000 gallons of gasoline in one year could restrain commerce in gasoline or tend to increase its price to the consumer.

Mr. Osborne, President of Gasoline Products Company, testified that the suit brought by Jersey against Pure Oil Company, a licensee of Gasoline Products, in 1922, practically stopped construction of Cross Units by licensees of Gasoline Products Company (see separate brief of The Texas Company, p. 34). It is fair to conclude, therefore, that infringement actions brought by Texas against Indiana or Jersey, or by Indiana against Texas or Jersey, or by Jersey against Texas or Indiana would have had a like effect upon their licensees, and that the production of cracked gasoline would have been far less. Instead of pursuing this course, thereby minimizing the pro-

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at the same rate (Ex. 563-II-9383/4; Ex. 86-II-786-7); Standard Oil Co. New York paid royalties of one half the normal rate (II-1224-1233) so the method would obviously underestimate their production 50 per cent.

The only conclusion that can be drawn from the record is that there are no accurate data of the total production of cracked gasoline, or of defendants' total production. The proved cracking *capacity* of 55 per cent for defendants and 45 per cent for others represents more nearly the actual relative production. So far as the record shows, the defendants owned 100 per cent of the cracking capacity in 1920. If others, between that year and 1925, built nearly an equal amount, it is hard to believe that the agreements here involved restrained competition in cracking.

duction of cracked gasoline, the primary defendants licensed each other and enabled each other to grant licenses under the patents of all for a defined process. The charge to Gasoline Products Company for rights under the patents of Texas, Indiana and New Jersey never exceeded 5 cents per barrel of stock charged—obviously a very nominal charge for the patent rights of these three companies—thus enabling Gasoline Products to put its Cross Process in the hands of numerous other refiners both inside and outside of Indiana's marketing territory. As licensing was the only business of Gasoline Products and as refining was the principal business of the other three primary defendants, it was natural that Gasoline Products should outstrip them in the licensing business.*

SEVENTH: The Government also assumes, indeed its whole case rests on the proposition that licensing is commerce. It charges that the primary agreements maintain royalties and reduce competition in *licensing*. It neither can nor does show reduced competition in *gasoline*, for defendants' licenses have greatly increased gasoline competition.

Nor does the Government justify its assumption that licensing is commerce by authority or analogy. Yet a covenant not to sue (a patent license) and a covenant to indemnify are so alike that the insurance and other cases on our main brief (p. 123) control.

*The Government's brief (p. 27) rightly, as now appears, takes exception to the statement (p. 24) of our main brief as to the advantages secured by Gasoline Products by the use of the inventions of the other primary defendants. A recalculation shows its advantage was from 8.3c to 9.6c per barrel, or more than twice the increase in its royalty rate. The Government's brief (p. 28) is in error in stating that the per barrel cost of operation was 15c higher in 1925. The raw material cost increased 18c, while the operating cost decreased 3c, leaving an increase of 15c in cost of gasoline, but not in operating, *i. e.*, producing, cost.

Not all business transactions are commerce; and patent licensing is not.

The propositions that a restraint on licensing restrains trade leads to the absurd result that every exclusive license is void since it is merely a covenant not to sue plus a covenant to make no like agreements. A prohibition of all further licensing is a greater restraint on licensing than any here, yet it is clearly lawful because the restraint is not on trade.

The assumption is also answered by *Allen v. Riley*, 203 U. S. 347 (and other cases simultaneously decided) holding that a state may regulate dealings in patents and patent rights. The state laws there sustained could stand only if dealings in patent rights are not interstate commerce.

The assumption that licensing is commerce raises questions as to when it is interstate, which by their very asking reduce the proposition to an absurdity. Consider the following cases and say which are interstate commerce if licensing be commerce.

1. A patentee executes at his own home a license to a manufacturer in his own state who does only intrastate business.
2. The licensee's business grows and becomes interstate.
3. The licensee's business was interstate when the license was executed.
4. How are the above cases changed if licensor and licensee live in different states and the license is executed (a) at the home of the licensor (b) at the home of the licensee (c) in a third state (d) in a foreign country.

Such questions are not moot; the Standard Oil Company of Ohio does no interstate business (Vol.

II, p. 804). If licensing be commerce, industry must know whether a license like that of the Standard Oil Company of Indiana, executed in Illinois and running to an Ohio corporation, is interstate commerce and why. But any thought about such questions shows we are dealing with non-commercial subject matter.

Nor can the government's assumption be supported because the license lay a charge on manufacturing, for *American Mfg. Co. v. St. Louis*, 250 U. S. 459, holds that a city tax on manufacturing is not a restraint of interstate commerce, even though the products move in interstate commerce. A royalty charge is strictly similar and is no restraint.

For a full discussion of this point we refer to the main brief pages 122 to 130.

EIGHTH: The Government infers an evil intent from Indiana's territorial clauses. This inference is destroyed by the findings of the Master (Vol. I, pp. 654-7) who heard and saw the witnesses and found contrary to the Government's suspicion. The false inference of intent from the option clauses is similarly met by the Master's finding as to their true purpose (Vol. I, pp. 653-4). Whether these clauses (waived before the decree) are technically legal is a moot question, but they cannot be invoked to color other branches of the case. Nor does the reservation in the Hoover contract of a right to employ territorial clauses show an intent or even desire to use them; it shows but a prudent reservation should Indiana in the future desire their protection (Vol. II, pp. 1020-1).

NINTH: We turn now to a statement of some of the practical difficulties which will arise either by the

application of the decree as written, or as it may be modified pursuant to the Government's concessions.

(a) As to the Indiana Company.

The Burton process, widely practiced by Indiana and its licensees, infringes the patents of Texas and New Jersey (main brief p. 71). If contracts Nos. 31 and 74 are stricken down, Indiana and its numerous licensees obtaining licenses prior to No. 31 are left as infringers.

And, under Contract No. 31 Indiana has installed and is using a large number of modified Holmes-Manley units (Vol. II, p. 1088, Vol. V, pp. 3192, 3198) covered by Texas patents, and its licensees have the right to do likewise. With Contract No. 31 stricken down, Indiana is left as an infringer of Texas patents in this respect also.

(b) As to The Texas Company.

The Holmes-Manley Process of The Texas Company embodies in its structure and operation not only The Texas Company's patents, but also patents of Indiana and of New Jersey. (P. 16, The Texas Company's brief.) If No. 31 is stricken down, Texas is therefore infringing Indiana Patents, and if No. 74 is stricken down, Texas is infringing New Jersey patents.

(c) As to the New Jersey Company.

In its Tube and Tank operations New Jersey is infringing patents of Indiana and of Texas. (Main brief of primary defendants p. 81.) With No. 74 stricken down, therefore, New Jersey is left as an

infringer of both Indiana and Texas patents and probably Gasoline Products patents also.

(d) As to Gasoline Products licensees.

The Cross Process infringes patents of Indiana and Texas and New Jersey (Main brief, p. 76 *et seq.*). All Gasoline Products' licensees, therefore, under licenses granted prior to Contract No. 55, are left as infringers of the patents of the other three primary defendants. As to licenses granted subsequent to No. 55, the Government suggests that the licensees be given the option to affirm or disaffirm.

(e) If, therefore, the decree be left in existence even as modified by the Government's suggestions, with only a few exceptions the primary defendants and the secondary defendants also are using processes which infringe the patents of at least one and possibly two or three *other* patent owning companies,* and thus the cracking operations of numerous refiners are put in jeopardy and dozens of infringement actions are invited. Pending applications and interferences on important subject-matter will add to the jeopardy and confusion. This not only jeopardizes the profits of these refiners but likewise creates a chaotic condition in the refining industry and jeopardizes the continually increasing supply of gasoline necessary in order to meet the continuing demands of an expanding automobile industry.

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*The Government states, in effect, that the District Court decided that the actual processes of the several primary defendants did not infringe the patents of other of the primary defendants. We do not agree with this. For the whole matter of infringement see our Main Brief, pp. 71, 76, 78, 81, 82 and especially 96-99.

We respectfully submit that the decree of the District Court should be reversed.

Respectfully submitted,

L. L. Stephens,
Russell Wiles,
Counsel for Standard Oil Co. (Indiana)

John W. Davis,
Charles Neave,
Chester O. Swain,
William R. Carlisle,
Counsel for Standard Oil Co. (New Jersey) and Standard Development Co.

C. B. Ames,
Drury W. Cooper,
Harry T. Klein,
Counsel for The Texas Company.

John B. Marsh,
Ramsay Hoguet,
Counsel for Gasoline Products Company, Inc.

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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1930

STANDARD OIL COMPANY (INDIANA), STANDARD OIL COMPANY (NEW JERSEY), STANDARD DEVELOPMENT COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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